THE HON'BLE SRI JUSTICE K.C. BHANU

WRIT PETITION No.10650 OF 2004

Between:

K. Jayaraj, S/o. Late K. Bheemachary,

Aged about 54 years, Occu: Foreman (Dismissed)

Secunderabad Cantonment, R/o. 2-21-220,

Akbar Road, Sanjeevaiah Nagar, Sikh Village,

Secunderabad.

... PETITIONER.

AND

The Executive Officer, Cantonment Board,

Secunderabad Cantonment, Court compound,

Secunderabad and 2 others.

... RESPONDENTS

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ORAL ORDER:-

The writ petition is filed seeking a Mandamus declaring the order, dated 27.05.2003, of the 1st respondent dismissing the petitioner from services etc., as confirmed in the order dated 26.11.2003 of the 2nd respondent and order dated 16.04.2004 of the 3rd respondent as arbitrary, illegal and unjust and consequently direct the respondents to reinstate the petitioner into service with all consequential benefits including backwages.

The grievance of the petitioner is that he was appointed as foreman in the Cantonment Board, Secunderabad, in the year 1972 and since then he has been discharging his duties sincerely. While the matter stood thus, on 28.11.2000 the 1st respondent issued Office Order No.214, dated 28.11.2000, placing him under suspension on the ground that payment of some work bills were made excessively and irregularly during the period 1990 to 1997. On 02.11.2002 the 1st respondent issued charge sheet to the petitioner and thereafter, enquiry was conducted and enquiry report was furnished to the petitioner on 30.04.2003. On 27.05.2003 the petitioner submitted his reply. On 26.11.2003 the 1st respondent issued a final order dismissing the petitioner from service. Against the said order he preferred an appeal before the 2nd respondent and the 2nd respondent in turn passed orders rejecting his statutory appeal with a modification that dismissal order shall be operative with effect from the date of issuance of dismissal order i.e., 27.05.2003. Against the same, the petitioner filed revision before the 3rd respondent and the same was rejected without looking into the facts and law involved in the matter. Aggrieved by the orders of the respondents 1 to 3, the present writ petition has been filed.

A detailed counter-affidavit has been filed by the respondents denying all the allegations made in the writ petition reiterating the facts relating to the loss occurred to the cantonment board in respect of purchase of lubricants, engine oil and repairs to the vehicles by the petitioner, about the criminal case filed against the petitioner, CBI investigation, action taken against the petitioner by the respondents.

The learned counsel for the petitioner contended that the financial mismanagement or loss of certain amounts of the Cantonment Board for the years 1992-97, a discrete enquiry has been conducted followed by a regular departmental enquiry. The documents relied upon by the respondents have not been furnished to the writ petitioner, which is a mala fide exercise of power and the findings of the enquiry officer are based upon no evidence, therefore, they are perverse in nature. He also stated that all the findings are based upon acquisitions or observations made by the CBI or from the Special Audit Report and perhaps there is a reason that the enquiry officer also observed that a separate enquiry might be ordered to make the enquiry more meaningful and hence he prays to allow the writ petition.

On the other hand, the learned standing counsel for the respondents contended that since the writ petitioner is working in the administrative control of the cantonment board, a regular departmental enquiry was conducted. The writ petitioner did not make any observation with regard to non-supply of the documents, but he has requested to furnish the certified copies of the documents which has been turned down and the delinquent himself admitted the charges and therefore, there are no grounds to interfere with the impugned proceedings.

There are about 44 findings, which have been given by the enquiry officer. Out of those findings, finding Nos.17 and 44 are the extracts of the reports of CBI and relevant points of the Special Audit Report. Those two documents have not been furnished to the writ petitioner admittedly.

The scope of the judicial review, in respect of the departmental proceedings, is very much circumscribed. This court is not concerned with the adequacy or reliability of the evidence, but if there is some legal evidence on which the findings can be based, the findings cannot be said to be perverse.

The counsel for the respondents relied upon the decision of the Supreme Court in ***STATE BANK OF PATIALA v S.K. SHARMA*** with regard to the principles to be followed in the context of disciplinary enquiries and the punishment to be imposed by the employer upon the employee, which reads as under:

> "We may summarize the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):
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> 1. An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

2. A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

3. In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceied in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefore, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisional which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) herein below is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

4. (a) In the case of a procedural provision, which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. It is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived if, then the order of punishment cannot be set-aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order punishment), keeping in mind the approach adopted by the Constitution Bench in B.Karunakar, (18994 AIR SCW 1050). The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

5. Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural

justice – or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action – the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing" (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.)

6. While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there si no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

7. There may be situations where the interest of state or public interest may call for a curtailing or the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

Some witnesses were examined during the enquiry. The delinquent himself was also examined. To know whether the findings are based upon any evidence on record or not, it is necessary to refer to the evidence of some of the witnesses who were examined. Some drivers have been examined. For example, witness No.3 categorically stated as follows:

> "Foreman used to see the log book and change the Engine oil during off duty time and used to tell him the next day that the oil and lubricants are changed."

There is no need for the foreman to change the oil in the absence of the driver. Witness Nos.4, 5, 6, 7 and 8 also stated the same thing. Therefore, from the

evidence on record, it is clear that some lubricants and the engine oil have been changed by the drivers. The allegation is that the petitioner obtained the pecuniary advantage in conspiracy with the partners of M/s. Ravinder Service Centre in the matter of procurement of lubricants to the vehicles of cantonment board, which resulted loss of Rs.204.47 lakhs to the cantonment board. It is not in dispute that the petitioner as a foreman has a responsibility to maintain the cantonment fleet of vehicles in proper condition. According to the allegations, he identified excess quantities of lubricants and stored the stocks as purchased from M/s. Ravinder Service Centre and on the same day sold those stocks as used to the vehicles, but the number of vehicles to which the lubricants were issued were never mentioned in the stock books which were maintained by the foreman. The writ petitioner himself admitted that as a foreman he used to draw the lubricants from M/s. Ravinder Service Centre, Secunderabad to maintain the vehicles of the cantonment board fleet, and contends that as per the actual requirement he has drawn the lubricants. If that is the case, he would have maintained the stock register properly mentioning to which vehicle the lubricants were issued. The explanation given by the writ petitioner is that the stock book is pertaining to drawing of lubricants only and separate accounts were maintained showing the daily lubricants put to the vehicles, which he has maintained, are found missing from his almyrah which he has noticed after a lapse of 3 years. The contention that he is maintaining separate accounts is found to be false, inasmuch as the change of engine oil and lubricants is a routine affair and he has to account for the same. Even as per his own admission, in the account books maintained by him separately for about 3 years, he has not noticed the separate accounts, which shows that it is a false statement. Therefore, it cannot be said that the findings are not based upon any evidence. A copy of the enquiry report is also furnished wherein he stated as follows:

> "I herewith agree that some of the findings and some of them I am denying."

but his contention is that he has not caused any financial loss to the cantonment board. Some of the findings observed by the enquiry committee have been admitted by the delinquent. Therefore, it cannot be said that the findings are not based on any evidence. Certain irregularities have occurred in purchasing lubricants and in carrying out the repairs to the vehicles for the period July 1991 to May 1997. During

that period admittedly the petitioner was the foreman. According to him as per the procedure, the lubricants have been purchased and the repairs of the vehicles have been carried out.

It is contended by the learned counsel for the petitioner that the enquiry committee gave a finding that separate enquiry may be ordered to make this enquiry more meaningful, but however, the enquiry officer found the writ petitioner guilty of the charges. The said observation was made in the contest of the Chief Executive Officer colluding with the petitioner. Since that is not the scope of the enquiry, he came to the conclusion that a separate enquiry may be ordered to make the enquiry more meaningful. Therefore, the said observation does not lead to an irresistible conclusion that the enquiry committee could not be in a position to determine and fix the liability on the writ petitioner.

No doubt, the finding No.17 and some relevant points of the Special Audit Report have been incorporated in the Enquiry Committee's Report and the same cannot be taken into consideration in view of the fact that firstly the report of the CBI and the findings of the Special Audit Report are not given to the writ petitioner and secondly the report of the CBI is only with regard to the allegations leveled against the writ petitioner and the others, so also the Special Audit Report pointed out certain irregularities against the writ petitioner and some others. Even the extracts of the report of the CBI and the points of the Special Audit Report pertaining to the repairs and maintenance of vehicles are eschewed from consideration, still there is a sufficient material to show that certain irregularities with regard to the financial aspects have taken place in purchase of lubricants and also in carrying out the repairs to the vehicles causing enormous loss to the Cantonment Board, so no stretch of imagination it can be said that the findings are based upon no evidence. The contention of the writ petitioner is that the departmental enquiry itself is contrary to the provisions of Section 24 (a) (b) of the Cantonment Act and that there is violation of principles of natural justice since some of the documents referred to the enquiry were not furnished and the statements of witnesses were recorded behind the back of the writ petitioner without giving any opportunity for him to cross examine them and that the enquiry report is vitiated by reason of perverse, mala fide and

abuse of process which were not taken at the time of giving explanation or at the time of filing appeal, but all these contentions have been raised for the first time in this writ petition, therefore, undue importance cannot be given to the submissions made by the learned counsel for the petitioner. Further more, it is not shown that any prejudice has been caused to the writ petitioner for non-supply of those documents.

It is not disputed that the disciplinary authority and the appellate authority, being fact finding authorities, have exclusive power to consider the evidence with a view to maintain discipline and they are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. It is also settled that the Court should not interfere with the decision of the administrator unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court in the sense that it was in defiance of logic or moral standards. This scope of judicial review is limited to the deficiency in the decision making process and not the decision.

Learned counsel for the respondents placed reliance on the decision of this Court in ***V. RAMANA v APSRTC & OTHERS*** the operative portion, which reads as under:

> "For the reasons aforementioned, we are of the opinion that the quantum of amount misappropriated or embazled by a delinquent official may not be taken into consideration in deciding the adequacy or otherwise of the punishment and the punishment of removal from service for such embezzlement or misappropriation cannot be termed as shockingly disproportionate."

He also placed reliance on the decision of this Court in W.P.No.18372 of 2001 dated 27.09.2001 wherein it is held as under:

> "As long as the order passed is not in violation of rules/regulations/statutory provisions, the enquiry can not be set aside in a casual manner. The Judicial review under Article 226 of the Constitution of India is open only on grounds of mala fides, arbitrariness and perversity."

He further relied on a decision of the Supreme Court in ***JANATHA BAZAR v SECRETARY, SAHAKARI NOUKARARA SANGH*** wherein it is held that once act of misappropriation is proved, may be for a small or large amount, there is no question of showing uncalled for sympathy and reinstating the employees in service.

He further relied upon another decision of the Supreme Court in ***DIRECTOR GENERAL, INDIAN COUNCIL OF MEDICAL RESEARCH & OTHERS v Dr. ANIL KUMAR GHOSH*** wherein it is stated that there is no material on record whatever to support the contention that the enquiry officer was biased against the first respondent. The record of proceedings of the enquiry shows that the enquiry officer has acted impartially and without any kind of bias whatever.

He further placed reliance on the decision of the Supreme Court in ***UNION BANK OF INDIA v VISHWA MOHAN*** wherein it is observed that the respondent was unable to demonstrate before us how prejudice was caused to him due to non-supply of the enquiry authority's report/findings in the present case. The above decision has been cited to show that the non-supply of CBI report and Special Audit Report would not cause any prejudice to the case of the petitioner since the charges leveled against the delinquent are misuse of lubricants and engine oils and also financial irregularities in getting the vehicles repaired.

The learned counsel for the respondent further relied upon the decision of the Supreme Court in ***STATE OF ASSAM v MAHENDRA KUMAR DAS*** wherein it is held that the above two extracts, it will be noted, emphasis, that rules of natural justice can be considered to have been violated only if the authority concerned acts upon information collected by it and the said information has not been disclosed to the party against whom the material has been used. In this case the enquiry report of the CBI and the Special Audit Report are not made available to the writ petitioner admittedly, but at the same time even if those reports have not been taken into consideration, still there is evidence.

He further relied on a decision of Supreme Court in ***R.S. SAINI v STATE OF***

PUNJAB wherein it is held that we too have considered the complaint within that limited scope in order to find out the correctness of the allegation that the impugned order of the disciplinary authority suffered from the vice of perversity, non-application of mind and tainted by malice and having come to the conclusion that the report of the inquiring authority cannot be faulted with on any of the grounds stated above, we are unable to agree with the appellant.

He further placed reliance on another decision of the Supreme Court in ***HIGH COURT OF JUDICATURE AT BOMBAY v SHASHIKANT S.PATIL*** wherein it is held that the settled legal position is that if there is some oral evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article 226 of the Constitution.

The disciplinary authority analyzed the charges with reference to the articles of charges. The presenting officer while taking into consideration, the reply of the charge, enquiry report and the relevant documents, accepted the findings of the enquiry committee and ordered for suspension. Against that order the appellant preferred an appeal before the appellate authority. The appellate authority also came to the conclusion that all the relevant documents were reportedly made available during the enquiry, observing that a common enquiry is not mandatory has given reasons. Therefore, the appeal is dismissed and the statutory revision is also dismissed. Since it is a serious case of financial irregularities concerning the statutory body in which the petitioner worked as foreman and he is responsible for all the maintenance and repairs of the vehicles, he is in-charge of all the vehicles, therefore, it is his duty to maintain the records properly. The petitioner has not maintained the records properly and he has withdrawn the lubricants only from M/s. Ravinder Service Centre and obtained undue pecuniary advantage in conspiracy with the partners of the said firm and thereby caused pecuniary loss to a tune of Rs.44.92 lakhs to the Cantonment Board. The other charge is that in the matter of procurement of the lubricants to the vehicles, he caused loss to a tune of Rs.204.47 lakhs to the cantonment board. Therefore, it is not a matter to interfere with in exercise of Article 226 of Constitution of India, especially, when it is not shown that any committee is biased against the writ petitioner and that the procedure in

conducting departmental enquiry has not been followed in accordance with rules. Hence, the writ petition is devoid of merit.

Accordingly, the writ petition is dismissed. No orders as to costs.

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02.08.2005

Note:- Furnish CC in 2 days

(B/o.)

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